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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

No. 73-5900

BARBARA JEAN DAWKINS AND
JACQUELINE DENISE DAWKINS, et al.,
Petitioners

vs.

CLIFTON M. CRAIG, et al.,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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I.

STATEMENT

In July, 1970, plaintiff Dawkins, a resident of Mecklenburg County, North Carolina, applied to the Mecklenburg County Department of Social Services for Aid to Families with Dependent Children (AFDC) benefits on behalf of herself and her daughter, Jacqueline Dawkins, then 14 years of age. On August 12, 1970, the plaintiff's application for public assistance was denied because of her refusal to procure a criminal warrant against her abandoning husband (and father of Jacqueline Dawkins) pursuant to §2210 of the North Carolina Financial Services Manual. On October 30, 1970, the plaintiff filed a civil action in the United States District Court for the Western District of North Carolina alleging that said regulation imposed an additional condition of eligibility for AFDC benefits and was, consequently, unconstitutional. The plaintiff prayed not only for declaratory and injunctive relief but also for award of funds allegedly wrongfully withheld.

Subsequently, the regulation at issue was rescinded by the defendants, and, on May 8, 1972, the parties filed a stipulation which indicated that said regulation had been revised and amended, to the satisfaction of the plaintiffs, thus obviating the necessity for any prospective relief. The stipulation further recited that the only issues left for resolution were the propriety and extent of class action relief and the propriety and extent of retroactive payments of welfare benefits to the plaintiffs. The District Court ordered that the case was properly maintainable as a class action and defined the class. Moreover, the District Court directed the defendants to make payments to the plaintiff and her class representing those AFDC benefits which but for §2210 they would have received from and after February 27, 1971. Appeal was taken by the defendants from this order.

On September 12, 1973, the United States Court of Appeals for the Fourth Circuit reversed the order entered October 4, 1972, by the District Court holding that the Eleventh Amendment to the Constitution of the United States prohibited the suit for retroactive AFDC payments. *Dawkins v. Craig*, 483 F. 2d 1191 (4th Cir. 1973).

On December 8, 1973, the plaintiffs transmitted to the Supreme Court of the United States a Petition for Writ of Certiorari to the Court of Appeals for the Fourth Circuit.

II.

ARGUMENT

POINT I

THE QUESTION PRESENTED FOR REVIEW AS TO WHETHER THE ELEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BARS JURISDICTION OF A FEDERAL COURT TO ORDER THE RETROACTIVE AWARD OF WELFARE BENEFITS TO WRONGFULLY DEPRIVED PUBLIC ASSISTANCE RECIPIENTS HAS BEEN BRIEFED AND ARGUED BEFORE THIS COURT IN *EDELMAN V. JORDAN*, DOCKET NO. 72-1410, WRIT OF CERTIORARI GRANTED JUNE 11, 1973, ARGUED DECEMBER 12, 1973, AND ACCORDINGLY WILL RAISE ISSUES NO NOVEL LEGAL FOR THIS COURT TO CONSIDER.

The question of whether the Eleventh Amendment constitutes a jurisdictional bar to the award of retroactive welfare benefits to public assistance recipients by a federal court has been the subject of considerable judicial debate. *Westberry v. Fisher*, 309 F. Supp. 12 (D. Me. 1970); *Zarate, et al. v. State Department of Health and Rehabilitative Services*, 347 F. Supp. 1004 (D. Fla. 1971), *aff'd. mem.*, 407 U.S. 918 (1972) *reh. denied*, 409 U.S. 903 (1972); *Francis v. Davidson*, 340 F. Supp. 351, 370 (D. Md. 1972, three-judge court), aff'd 409 U.S. 904 (1972); *Rothstein v. Wyman*, 467 F. 2d 226 (2nd Cir. 1972) *cert. denied*, 411 U.S. 921 (1973), *reh. denied*, 411 U.S. 988 (1973); *Jordan v. Weaver*, 472 F. 2d 985 (7th Cir. 1973), *cert. granted sub nom. Edelman v. Jordan*, 412 U.S. 937 (June 11, 1973).

On December 12, 1973, the case of *Edelman v. Jordan* was argued before the Supreme Court. 42 U.S. Law Week 3361. In *Edelman (sub nom. Jordan v. Weaver, supra)* a class suit was instituted challenging the actions of Illinois and Cook County officials in administering the federal-state program of Aid to the Aged, Blind, and Disabled (AABD) under 42 U.S.C. §§1381-1385. A permanent injunction was entered by the district court requiring

compliance with the federal time limits for processing and paying AABD applicants and retroactively requiring the defendants to release AABD benefits withheld from those whose applications had not been processed within federal time limits. The defendants appealed to the Seventh Circuit "on the grounds that plaintiff's suit for retroactive welfare benefits may not be maintained in federal court because barred by the Eleventh Amendment. . . "*Jordan v. Weaver, supra* at 988. The Court of Appeals held that the Eleventh Amendment did not bar equitable relief in the form of a release of welfare funds withheld from those whose applications had not been timely processed and that even if the Eleventh Amendment or the sovereign immunity doctrine was applicable, the State of Illinois had constructively consented to suit by the mere act of participating in the federal AABD program. *Jordan v. Weaver, supra* at 986. The defendants subsequently requested review by the Supreme Court of this decision and on June 11, 1973, their petition for writ of certiorari was granted. *Edelman v. Jordan, supra.*

With the exception of the public assistance programs involved and the root causes of the claim for retroactive welfare benefits, the facts and issues involved in the case at bar are very nearly identical to those in *Edelman.* Certainly the issue as to whether the Eleventh Amendment constitutes a jurisdictional bar to a federal court making an award of retroactive welfare payments is precisely identical. Hence, it is the Respondents' position that the Court's decision in *Edelman v. Jordan, supra*, will, in all likelihood, be entirely dispositive of the case *sub judice* and that the decision to grant or deny the Petitioners' writ of certiorari should simply be deferred until such time as the Court has rendered its opinion in *Edelman.* C.F. *Edelman v. Jordan*, ____U.S.____, 94 S.Ct. 13, 14 (July 19, 1973).

POINT II

IN ANY EVENT, THERE IS NO JURISDICTIONAL BASE FOR THE FEDERAL DISTRICT COURT TO AWARD RETROACTIVE WELFARE BENEFITS TO WRONGFULLY DEPRIVED PUBLIC ASSISTANCE RECIPIENTS.

The Eleventh Amendment to the Constitution of the United States provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State."

This amendment was adopted in 1798 in the wake of and in response to the rather unpopular decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). In *Chisholm* it was held that the diversity jurisdiction of the federal courts extended to suits by a citizen of one state to collect a debt owed by another state. Cf. U.S. Constitution, Article III, Section 2 and 28 U.S.C. §1332 (1970). *Chisholm*, however, did not involve federal question jurisdiction but was in fact merely a diversity suit brought by the plaintiff seeking recovery from the State of Georgia on a note. The Eleventh Amendment, nontheless, was the logical offspring of the fear that impecunious states would be deluged with federal lawsuits such as *Chisholm* by creditor-citizens of other states to collect rather large debts. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821).

Legal commentators have frequently invoked *Cohens* as authority for the proposition that the Eleventh Amendment should be strictly confined to its apparent purpose of overruling *Chisholm* in withdrawing a portion of diversity jurisdiction from the federal judicial power (i.e., when the plaintiff is a private person and the defendant is a state) while leaving intact the full scope of federal question jurisdiction.[1] As support for this proposition the following statement of Justice Marshall in *Cohens* is cited:

> "A general interest might well be felt in leaving to a State the full power of consulting its convenience in the adjustment of its debts or of other claims upon it; but no interest would be felt in so changing the relations between the whole and its parts, and so strip the government of the means of protecting, by the instrumentality of its courts, the constitution and laws from active violation." *Cohens* at 407.

However, in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) which involved a suit under federal question jurisdiction by a federal agency against the auditor of the State of Ohio who had acted pursuant to an act of the Ohio Legislature, Justice Marshall discredited the above proposition by assuming that the state could *not* have been made a party to the litigation. More

recent support for the contrary proposition that the Eleventh Amendment is not only a limitation on diversity jurisdiction but also on federal question jurisdiction is provided by the following quote from the concurring opinion of Mr. Justice Marshall in *Employees of Dept. of Public Health & Welfare v. Missouri*, 411 U.S. 279, 292 (1973):

> "Thus, despite the narrowness of the language of the Amendment, its spirit has consistently guided this Court in interpreting the reach of the federal judicial power generally, and 'it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given: not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification,' *Ex parte New York*, No. 1, 256 U.S. 490, 497, (1921); see *Smith v. Reeves*, 178 U.S. 436, 447-449, (1900)." *Employees* at 292.

Perhaps the issue of the limitation on federal question jurisdiction imposed by the Eleventh Amendment was not laid to rest until the Supreme Court in *Hans v. Louisiana*, 134 U.S. 1 (1890) held that the amendment precluded suits against the state by citizens of the same state when the jurisdiction was based on a federal question. Thus, judicial construction of the Eleventh Amendment has established that "an unconsenting State is immune from suits brought in federal courts *by its own citizens as well as by citizens of another State.*" *Employees, supra* at 280 (emphasis supplied).

However, the Eleventh Amendment has never been recognized as a bar to a suit against state officers to compel their performance of official duty in conformity with federal law. *In re Ayers*, 123 U.S. 443 (1887), *Ex parte Young*, 209 U.S. 123 (1908); *Employees, supra*. The rationale, of course, is simply that a state officer is divested of his official capacity when acting unconstitutionally so that his action is not state action for purposes of the Eleventh Amendment. Yet, a patent attempt to avoid the embrace of the

amendment by simply denominating state officials as parties defendant where actually the real party in interest is the state has never met with much success. *In re Ayers, supra; Ex parte Young, supra, Rothstein v. Wyman, supra.* In *Ayers*, for example, the Court said

> "The inference is, that where it is manifest, upon the fact of the record, that the defendants have no individual interest in the controversy, and that the relief sought against them is only in their official capacity as representatives of the State, which alone is to be affected by the judgment or decree, the question then arising, whether the suit is not substantially a suit against the State, is one of jurisdiction." *Ayers* at 489.

Whenever it is determined that a suit is actually against the State the Eleventh Amendment looms as a bar. Obvious problems inhere in actions brought pursuant to Section 1983 of the Civil Rights Act of 1871 because of the "person" requirement therein.* When, in point of fact, is a suit against the state if the parties defendant must be "persons" in order to create a cause of action under section 1983? *Ex parte Young, supra*, of course, established that the Eleventh Amendment does not preclude a federal tribunal from directing a state official to bring his conduct into compliance with federal law. Accordingly, prospective injunctive relief restraining a state official from performing contrary to federal legal mandates does not fall within the purview of the Eleventh Amendment. On the other hand, an order directing the payment of retroactive welfare benefits obviously draws upon the state treasury and, consequently, violates the proscription embodied in the amendment. "It is . . . a part of the lore of the Eleventh Amendment," according to *Rothstein*, "that, even though a state may not be named as a party defendant, any judgment declaring a liability which must be met from public funds of the State does come within reach of the Eleventh Amendment" (simply because it involves *public state funds*). *Rothstein v. Wyman* at 236, citing *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 463-464 (1945). The court in *Rothstein* put the point succinctly

> "It is one thing to tell the Commissioner of Social

> Services that he must comply with the federal standards for the future if the state is to have the benefit of federal funds in the programs he administers. It is quite another thing to order the Commissioner to use state funds to make reparation for the past. The latter would appear to us to fall afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force." *Rothstein* at 236-237; Cf. also *Westberry v. Fisher, supra.*

As justification for the award of retroactive welfare benefits by a federal forum it has been asserted that the protection of the Eleventh Amendment is always subject to waiver and that participation by a state in federal-state programs of public assistance (i.e., those receiving federal grants-in-aid) is indeed tantamount to such waiver. *Rothstein, supra*, at 238-239. Although it may be open to debate as to whether the limitation of the judicial power of the United States inherent in the Eleventh Amendment is subject to waiver, the Supreme Court has frequently recognized voluntary relinquishment of the Eleventh Amendment shield - but only when clearly and unequivocally shown. *Parden v. Terminal Railway of Alabama State Docks Department*, 377 U.S. 184 (1964); *Employees, supra; Great Northern Life Insurance Company v. Read*, 322 U.S. 47 (1944).

In *Parden*, a suit brought against a state-owned and operated railroad for damages for personal injuries sustained by employees covered by the Federal Employers' Liability Act (45 U.S.C. §§51-60 (1970)), the Court found that Congress had "conditioned the right to operate a railroad in interstate commerce upon availability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit." *Parden* at 192.

In the present case, "Congress has not explicitly conditioned the grant of such funds (federal grants-in-aid to state public assistance programs) upon the willingness of the recipient state to waive the immunity from suit provided by the Eleventh Amendment; nor are retroactive payments so necessary to the effectuation of congressional policies that a waiver arises by implication." *Rothstein, supra*, at 238. Moreover, there is in the case at bar no such injection

of the North Carolina AFDC program into interstate commerce. Finally, relying on the Court's governmental-proprietary distinction in *Parden*, the Respondents contend that despite being imbued with a certain federal flavor the North Carolina AFDC program is wholly within the State's "own sphere of authority", and is, furthermore, operated from a purely humanitarian (vis-a'-vis proprietary) standpoint. *Parden, supra*, at 196; Cf. also *Employees, supra*, distinguishing *Parden*.

Accordingly, the Respondents argue that the Eleventh Amendment imposes a constitutional limitation on the judicial power of the United States both in diversity jurisdiction cases and federal question jurisdiction cases, that although a state may waive the protection of the Eleventh Amendment, such waiver is not to be lightly inferred, and that in the case *sub judice* there are no circumstances by which any waiver, express or implied, by the State of North Carolina can even be suggested.

III.

CONCLUSION

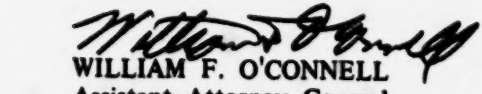
The decision of this Court as to whether to grant Petitioners' Writ of Certiorari should be deferred in the interest of judicial economy until an opinion is rendered in *Edelman v. Jordan, supra*.

Nevertheless, the Respondents conclude that the award of retroactive welfare benefits by the United States District Court was improper under the Eleventh Amendment to the Constitution.

This the 9th day of January, 1974.

Respectfully submitted,

ROBERT MORGAN
Attorney General of
North Carolina



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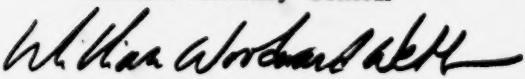

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FOOTNOTES

1. McCormack, "Intergovernmental Immunity and the Eleventh Amendment," 51 N.C.L. Rev. 485 (1973)

2. 42 U.S.C. §1983 (1970):

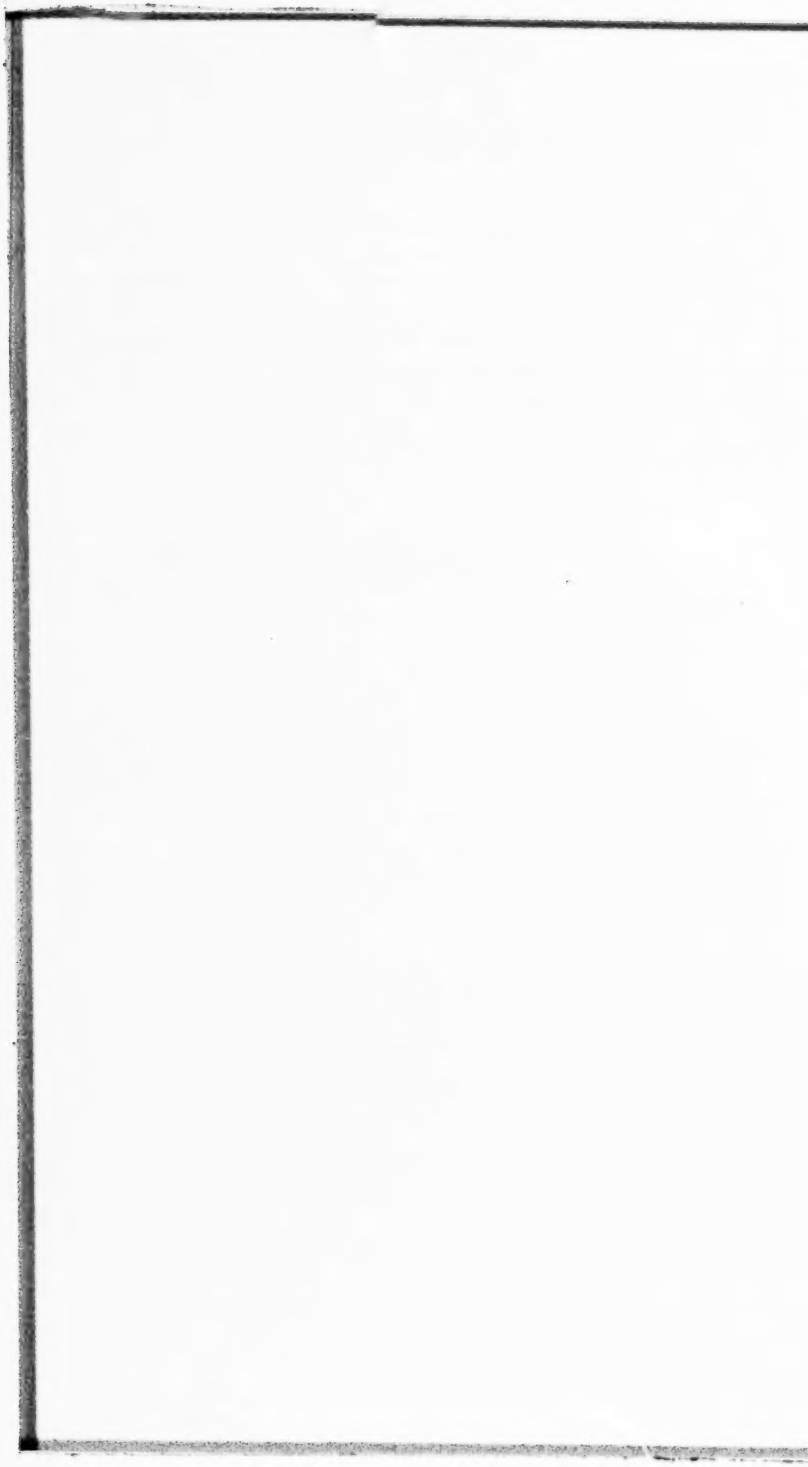
> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

PROOF OF SERVICE

I hereby certify that I served three copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit on Robert Belton, Suite 730, East Independence Plaza, 951 South Independence Blvd., Charlotte, North Carolina 28202 (which is less than 500 miles from the undersigned) by depositing the same in the U. S. mails, first class postage prepaid, this the 9th day of January, 1974.

All parties required to be served have been served.

William F. O'Connell



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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION TO BE APPOINTED COUNSEL PRO HAC VICE

William Woodward Webb, Associate Attorney, North Carolina Department of Justice, hereby petitions the Court to be appointed counsel for the Respondents *pro hac vice* in the event that certiorari is granted herein.

In support of this petition, William Woodward Webb says that he is presently ineligible to be a member of the Bar of the Supreme Court of the United States for the reason that he has not been a practicing attorney or counsellor in the highest court of a State, Territory, District, Commonwealth, or Possession for three years past, having first been admitted to the North Carolina State Bar

on September 20, 1971; that the counsel of record for the Respondents before the United States Court of Appeals for the Fourth Circuit and the United States District Court for the Western District of North Carolina, Robert S. Weathers, resigned as Assistant Attorney General, North Carolina Department of Justice on July 20, 1973; that since said counsel's resignation your petitioner has had primary responsibility for and intimate acquaintance with this action.

This the 9th day of January, 1974.

William Woodward Webb

PROOF OF SERVICE

I hereby certify that I served one copy of the foregoing Petition to be Appointed Counsel *Pro Hac Vice* on Robert Belton, Suite 730, East Independence Plaza, 951 South Independence Blvd., Charlotte, North Carolina 28202 (which is less than 500 miles from the undersigned) by depositing the same in the U. S. mails, first class postage prepaid, this the 9th day of January, 1974.

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William Woodward Webb